No. 12507

United States
Court of Appeals
For the Ninth Circuit.

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12507

United States
Court of Appeals
For the Ninth Circuit.

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

MR. HEINRICH ROEDEL,
Box 651—P.M.B.
Alcatraz, California,
In Propria Persona.

MR. FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,
Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California

Cr. No. 27792-S

HEINRICH ROEDEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR VACATION OF THE JUDGMENT AND SENTENCE AND TO QUASH THE VERDICT

The Verified Motion of Heinrich Roedel for vacation of the judgment and sentence and for quashing of the verdict respectfully shows this Honorable Court that:

I.

Your petitioner is unlawfully restrained of his liberty by E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California; the body of your petitioner, the said E. B. Swope and the said United States Penitentiary at Alcatraz, California, are all, and each of them, within and subject to process issued from out of and under the authority of this Honorable Court.

II.

Jurisdiction

Petitioner is entitled to file this motion under the authority of and in conformity with the provisions contained in the New Title 28 U.S.C. Section 2255—effective September 1, 1948, which provides:

> "A prisoner in custody under sentence of a Court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the Sentence."
>
> A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the Case Conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there Has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack,

the Court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." (Emphasis Supplied.)

III.

Facts Involved

On July 29, 1942, petitioner was arrested by the Federal Bureau of Investigation and later accused of setting a match off at Hopeman Brothers, Inc. Warehouse. It is alleged that petitioner was held in custody at the Alameda County Jail and on August 20, 1942, he was interviewed by an agent of the Federal Bureau of Investigation, to wit, a one Robert H. Moran. The record discloses that no evidence was introduced showing that a crime had been committed in that the only witness was William H. Green, who testified that petitioner struck a match. Petitioner alleges that he is innocent of being present in the Warehouse and that the only knowledge of such events on his part is taken from the actual facts presented at the trial.

On November 25, 1942, a Federal Grand Jury returned and presented a true bill by an indictment charging that petitioner did, on or about July 28, 1942, at the premises known as Hopeman Brothers, Inc. Warehouse, Richmond Shipyard No. 2, Richmond, California, and within the Southern Division of the Northern District of California, said defendant then and there being, did, the United States then being at war, with intent to interfere with and

obstruct the United States in carrying on the War, wilfully, knowingly and feloniously attempt to injure said premises, which were and are buildings where war material was and is being produced and manufactured, by attempting to set fire to the same.

On November 27, 1942, petitioner was arraigned and entered his plea of not guilty to the charge hereinabove set forth and, that a one Mr. James B. O'Connor an attorney at law was appointed to defend petitioner, the case was continued until December 8, 1942.

On December 15, 1942, the case was tried before a jury and on December 19, 1942, petitioner was duly convicted and sentenced for a term of thirty (30) years.

An appeal was prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and the judgment of conviction was affirmed in Roedel v. United States, 9 Cir., F. (2).

Petitioner avers and alleges that his attorney advised him that he had ninety (90) days in which to apply for writ of certiorari in the Supreme Court of the United States. That after a period of thirty days had expired his attorney advised him that it was then too late in that the federal rules of Criminal procedure provided for a petition to be filed with the Clerk of the Supreme Court within thirty days from entry of judgment by the Court of Appeals and, that by reasons of his counsel's misrepresentation of the law to petitioner, he was deprived of the right to file for Writ of Certiorari in the Supreme Court which was a denial of the due process of law

he was entitled to by the Fifth Amendment to the United States Constitution, in that:

IV.

Petitioner's Contentions

(1) It is the contention of the petitioner and he alleges that the said indictment did not inform him of the nature and cause of the accusation that he was entitled to under the Fifth and Sixth Amendments to the United States Constitution, in that:

(A) The indictment omitted the pile of lumber that was alleged to have been the subject of the testimony as given by the Government's witness "Green," and:

(b) There was no evidence to establish the corpus delicti in that such evidence failed to disclose that there had been an attempt to set fire to the buildings charged in the indictment.

(2) It is the contentions of the petitioner and he alleges that the judgment and sentence is void in that the indictment failed to charge the essential facts necessary to constitute a valid indictment, in that:

(a) The evidence introduced clearly showed that some one struck a match while standing by a pile of lumber, and:

(b) Petitioner was informed by the indictment that he was accused of setting fire to buildings.

It is therefore contended and alleged that the evidence was insufficient to convict him, in that, the indictment failed to inform him of the nature and cause of the accusation and, that the failure of the evidence to establish the corpus delicti rendered the

proceedings void ab initio, and the judgment and sentence should be vacated, set aside, and for naught held, and the verdict of the jury quashed, in that:

V.

The Indictment Failed to Inform Petitioner of the Nature and Cause of the Accusation

Point One

The evidence before the Grand Jury disclosed that a man was seen lighting a match while he stood by a large pile of kiln dried lumber. The indictment in the case at bar does not charge that petitioner attempted to set fire to the lumber, i.e., the indictment charges that petitioner attempted set to buildings where war material was and had been in production. A newspaper article showing petitioner's claim to be true is annexed hereto, designated petitioner's Exhibit A, and by reference made a part hereof as though fully incorporated herein at length.

If the indictment fails to charge that petitioner attempted set fire to the pile of lumber, see exhibit A, then no offense against the laws of the United States was charged by the indictment. The indictment as returned by the Grand Jury reads in words and figures, to wit:

"In the November 1942 term of said Division of said District Court, the Grand Jurors on their oaths presents: That

Heinrich Roedel

(hereinafter called said defendant), on or about July 28, 1942, at the premises known as Hopeman

Brothers, Inc. Warehouse, Richmond Shipyard No. 2, Richmond, California, and within the Southern Division of the Northern District of California, said defendant then and there being, did, the United States then being at war, with intent to interfere with and obstruct the United States in carrying on the War, wilfully, knowingly and feloniously attempt to injure said premises, which were and are buildings where war material was and is being produced and manufactured, by attempting to set fire to the same.

Approved as to Form:

W. E. L.
FRANK J. HENNESSY,
United States Attorney.

(Endorsed)

A true bill, Emil E. Engels, Foreman. Presented in Open Court and Ordered Filed Nov. 25, 1942.

WALTER B. MALING,
Clerk,

By J. P. WALSH,
Deputy Clerk.

The indictment charges that petitioner attempted to set fire to buildings where war material was being produced and manufactured. There was no such evidence before the Grand Jury and none before this Court. The statute upon which the indictment is based makes it a crime to attempt to injure or destroy, any war material, war premises, or war utilities. 50 U.S.C.A. Section 102. The indictment

fails to charge a crime in that the corpus delicti is not established by the evidence, (a) because there was no overt act to make the crime complete, and (b) the evidence shows that no attempt was made to set fire to the alleged buildings charged in the indictment. The fact that someone struck a match does not make it a criminal offense even in a war plant, where, as here, the building where the pile of lumber was located did not belong to the United States. The building in question "Hopeman Brothers, Inc. Warehouse" does not belong to the Richmond Shipyard No. 2, in that, "Exhibit A" clearly shows that the Warehouse belonged to a subcontractor. The indictment to charge an offense (50 U.S.C.A. Section 102) must charge an overt act to complete the crime. The material stored in "Hopeman Brothers, Inc. Warehouse" was not material being produced or manufactured as stated in the indictment. Quoting from petitioner's "Exhibit A":

"Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor."*

Petitioner urges that the indictment fails to spell out the elements of the offense under (50 U.S.C.A. Section 102), in that:

"When the fact which is made by the statute an essential element of the crime is a collective or general one, it is necessary to specify the particular thing intended to be charged." and, ". . . the offense must be directly charged, and cannot be made out by inference or implication."* (McKenna v. U. S.,

6 Cir., 127 F. 2d 88.)

In the case at bar this Honorable Court will note that the indictment fails to allege the essential fact that an attempt was made to set fire to the lumber pile in question (see Exhibit A) and therefore did not charge a crime against the laws of the United States. As was said in Grimsley v. United States, 5 Cir., 50 F. (2d) 509, that:

"The opinion of the majority is an extremely simple and, as I think, correct statement of the principle that two substantial things must concur before a defendant may be convicted of a felony in a Court of the United States; (1) He must be charged by indictment with the commission of a federal offense; (2) the offense must be proven against him.

I have always supposed that an indictment without proof cannot support a conviction, so proof without indictment cannot."*

The same rule is laid down by the United States Court of Appeals for the Ninth Circuit in Peters v. United States, 9 Cir., 94 F. 127, therein the Court held that:

"Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated * * *." (Citing numerous cases.)

The only evidence here as shown by the record proper was a statement made by one of the Government witnesses that some one struck a match. The

striking of a match does not constitute a crime against the laws of the United States regardless of the place where the match is struck. Assuming that a man be guilty of striking a match in an area where smoking is prohibited, "does it not take more than an intent to make a crime cognizable under the laws of the United States"? The indictment in the case at bar alleges that petitioner attempted to set fire to certain buildings, to wit, premises known as Hopeman Brothers Inc. Warehouse, Richmond, California. The evidence discloses that a match was struck (See Record Page 78) and that the watchman said "No smoking" but his testimony was so conflicting that it should have been disregarded. If the evidence reveals that only a match was struck it is obvious that there was no attempt to set fire to the alleged lumber pile in that the statute (50 U.S.C.A. Section 102) makes it a crime for any person that attempts to injure and etc. In the case at bar the evidence does not disclose such an attempt and the indictment fails to allege that petitioner attempted to set fire to the pile of lumber in question, that is to say, the pile of lumber is essential to the indictment to establish the corpus deliciti and it would follow that the omission is one of substance and the indictment amounts to nothing. The wording of the indictment fails to disclose that there was an attempt to set fire to the pile of lumber in question. In the case of Fasule v. United States, 272 U.S. 622, the Supreme Court of the United States held:

"It is not permissible for the Court to search for

an intention that the words themselves do not suggest. United States v. Viltburger, 5 L. Ed. 37. And before one can be punished it must be shown that his case is plainly within the statutes. United States v. Lacher, 134 U.S. 624."

Petitioner finds the same rule laid down in United v. Cook, 17 Wall 174, therein the Supreme Court held:

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

And in the Text Books the rule requires that

"The failure to properly allege any material fact or circumstances necessary to constitute the crime charged is a fatal defect, and such omission cannot be supplied by a charge that the act was committed 'Contrary to the law' 'or unlawfully,' etc."

(Citing Cases.)

(42 C.J.S., page 1022, Section 130.)

In the case at bar the indictment fails to charge that petitioner committed any overt act in that the pile of lumber in question was omitted from the indictment and there was no proof that would sustain that petitioner attempted to set fire to certain buildings. In the case at bar the only evidence was upon a theory that a match was struck which was insufficient to sustain a conviction. As was said in Grimsley v. United States, 5 Cir., supra, that:

"No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there

is general concurrence in the statement that if "the indictment fails to state the facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained." Sonnenberg v. United States, (C.C.A.) 264 F. 327, 338; Wong Tai v. U.S. 273 U.S. 80, 47 S. Ct. 300, 71 L. Ed. 545; Wishart, v. U.S. (C.C.A.) 29 F. (2d) 103, 106; Shilter v. U.S. (C.C.A.) 257 F. 724, and this even in the absent of an attack of any kind upon the indictment in the Court below." Sonnenberg v. U.S., (C.C.A.) 264 F. 327, 328."

Petitioner respectfully urges here that the indictment is based upon an incident that never happened. The only evidence possible for taking the matter before a grand jury was the striking of a match near a lumber pile which does not make a complete crime. In this respect petitioner cites this Honorable Court to Blackstone Commentaries, P. 21, therein it is held:

"To make a complete crime cognizable by human laws, there must be both a will and an act. * * * In all tempered jurisdiction, an overt act, or some open evidence of an intended crime is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And, as a vicious will without a vicious act is no crime, So on the other hand, an unwarranted act without a vicious will, is no crime at all. So that to constitute a crime against human laws, there must be first, a vicious will; and second an unlawful act consequent upon such vicious will."*

It is respectfully urged that in the case at bar the indictment attempts to charge an innocent man with a crime that was never committed. How can this Honorable Court say that there was an attempt to set fire to the buildings where, as here, the fire would have to be set to the lumber pile before it could have spread to the warehouse buildings and, since no fire was ever started there was no attempt to injure the buildings where war material was being stored. This is proven by petitioner's "Exhibit A" therein it clearly appears that:

"Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor, but police doubt that it could have caused much damage to the main shipyard structures." (Emphasis supplied.)

Petitioner therefore urges that since the pile of lumber in question was essential to the charge in the indictment that such omission was one of substance and rendered the indictment void on its face. In the case of United States v. Crummer, 10 Cir., 151 F. (2d) 958, the Court held that:

"The Sixth Amendment to the Constitution of the United States provides among other things that in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation. And by settled rules of criminal pleadings, a defendant is informed of the nature and cause of the accusation against him if the indictment charges all of the essential elements of the offense with sufficient completeness and clarity to apprise him of the crime

charged with such reasonable certainty as will enable him to make his defense and to plead the judgment of acquittal or conviction in bar to a future prosecution for the same offense. Evans v. United States, 153, U.S. 584, 14 S. Ct. 934, 38 L. Ed. 830; Cochran and Sayre v. United States, 157 U.S. 286, 15 S. Ct. 628, 39 L. Ed. 704; Rosen v. United States, 16 1 U.S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606; Burton v. United States, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Bartell v. United States, 227 U.S. 427, 33 S. Ct. 383, 57 L. Ed. 583; United States v. Brehrman, 258 U.S. 280, 42 S. Ct. 303, 66 L. Ed. 619; Wong Tai v. United States, 273 U.S. 77, 47 S. Ct. 300, 71 L. Ed. 545; Hagner v. United States, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861; Butler v. United States, 10 Cir., 53 F. (2d) 800; Weber v. United States, 10 Cir., 80 F. (2d) 687; Crapo v. United States, 10 Cir., 100 F. (2d) 996; Graham v. United States, 10 Cir., 120 F. (2d) 543; Travis v. United States, 10 Cir., 123 F. (2d) 268; Rose v. United States, 10 Cir., 128 F. (2d) 622, Certiorari denied 317 U.S. 651, 63 S. Ct. 47, 87 L. Ed. 524; United States v. Armour & Co., 10 Cir., 137 F. (2d) 269."

The Court goes on to say:

"Where a statute creating an offense sets forth fully, directly, and expressly all of the essential elements necessary to constitute the crime intended to be punished, it is sufficient if the indictment charges the offense in the words of the statute. But

where the statute is in general terms and does not set out expressly and with certainty all of the elements necessary to constitute the offense, the indictment must descend to particulars and charge every *constutuent* ingredient of which the crime is composed.*[1] United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588; United States v. Carll, 105, U.S. 611, 26 L. Ed. 1135; United States v. Hess, 124 U.S. 483, 8 S. Ct. 571, 31 L. Ed. 516; Blitz v. United States, 153 U.S. 308, 14 S. Ct. 924, 38 L. Ed. 725; Pettibone v. United States, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419; Keck v. United States, 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505; Armour Packing Co. v. United States, 209 U.S. 56, 28 S. Ct. 428, 52 L. Ed. 681."

In the case at bar this Honorable Court will note that the indictment charges one thing and the evidence disclosed that something else happened. The statute is in general terms and for reason stated in United States v. Crummer, supra, see footnote infra, the indictment failed to descend to particulars and charge the pile of lumber in question which was essential to the offense.

In the case of Oesting v. United States, 234, F. 304, therein the Court held that:

"By counsel's failure to demur to the indictment, or to move to quash or in arrest of judgment after

---

*[1]The evidence disclosed that some one struck a match but failed to disclose that there had been an attempt to set fire to the buildings charged in the indictment.

verdict, he waives his right to object in an appellate Court to any matter going to the form in which the offense is stated, but he does not waive his right to raise objections that the indictment is lacking in some essential element to constitute the offense which is charged." (Emphasis supplied.)

Petitioner therefore urges that the indictment is bad in failing to charge the pile of lumber in question and that since the evidence failed to establish the corpus delicti that the Court was without jurisdiction and the judgment of conviction is void, in that:

VI.

Point Two

The Evidence was Insufficient to Convict Petitioner

It is respectfully urged that the only evidence before the jury was that of William H. Green the night watchman from Richmond Shipyard No. 2 and the Government admitted such evidence was insufficient:

Mr. Licking: No questions. If the Court please, I have no more witnesses; the Government closes at this time. I would like, however, with the understanding, of course, that if the evidence at this time is deemed insufficient we might have an opportunity of calling a further witness, which would not have any effect upon any rights the defendant has at this time." (R. 91.)

Petitioner respectfully submits the testimony of William H. Green which appears in the transcript of record in Roedel V. United States, No. 10,435,

and urges that this Honorable Court order admitted into evidence the whole of the testimony of the aforesaid William H. Green, in that, deleted testimony of the said William H. Green will clearly show that he committed perjury on the witness stand. The following testimony of William H. Green appears from the record:

William H. Green, called as a witness for the United States, having been first duly sworn, testified substantially as follows:

My name is William H. Green. I am 51 years of age. At the present time I am employed in maintenance at Richmond Shipyard No. 2. The early morning of July 28, 1942, I was employed as a police guard at Richmond Shipyard, which include the premises known as Hopeman Bros. Warehouse. On that evening I had occasion to see and encounter the defendant whom I now identify as being seated in the Court room. I first saw him about 1:45 of the morning of..... July 28. He was under a pile of lumber opposite the passage through the Warehouse from the east side to the west side. That would be in the north end. I came in the warehouse through the southeast door, crossed to the aisle to the southwest door and then up the aisle. Here is the door that I entered the Warehouse—(indicating on the diagram.) I crossed from the southeast door to the southwest door. The place where I entered is where you have the mark G-1 on the diagram. From the southwest door, that is the mark G-2 on the diagram, I went to the northwest door at the end

of the building which you marked G-3 on the diagram. I then went back to the northeast door retracing my steps. From the north door I went back to the southeast door. From there I went towards the northwest door. From the northwest door I started towards the northeast door. As I got right in here (indicating) where there is a pile of lumber, I heard the click of a match being lit. That would be along here on this aisle which you mark G-4. As I got there I heard the click of a match and I turned my head to the right and I saw the defendant. He had the match in his hand striking it. I said to him, "No smoking." As I made that remark, his right hand went to his pocket and out came a gun. (His hand was in this position); when I dove right into him I was about 4 feet from him at the time. I would be in this position on my hands and knees (indicating). His hand went to his right pocket. That was after I heard the flash of a match. I was coming toward him and when I got where I heard the click and I turned and said, "No smoking," and his right hand went to his pocket and he came out with a gun. He had the gun in this position (indicating), and I just fell sideways into his arm and knocked the gun out of his hand. I caught his arm under me and he was on top of me. The gun was lying on the left of both of us. I grasped his arm and hand and he fell on top of me. We wrestled on the floor both of us trying to get the gun. Once I shoved the gun further away. I didn't want him to get hold of it and I didn't want to very badly myself. The gun was lying right out opposite my head.

I later pointed out to Agent Moran the point where this struggle occurred and at that time photographs were taken of the various localities. I recall the locality which is depicted in Government's Exhibit No. 1 for Identification. That was practically the place where he was kneeling down and where the material was that he was attempting set afire.*1 Government's Exhibit No. 3 for Identification indicates the point right opposite where the struggle between the two of us occurred. Government's Exhibit No. 4 for Identification is the spot where the struggle between the two of us took place and also where the oakum was placed amongst the lumber. Government's Exhibit No. 5 for Identification shows the window that was broken by the stick that was thrown at me. Government's Exhibit No. 7 For Identification depicts the center aisle down through the lower floor of the warehouse. These pictures indicate the same situation that existed the next morning when Agent Moran was there and interviewed me. At that time I pointed out these situations to Agent Moran.

Whereupon Government's Exhibits Nos. 1 to 7 For Identification were offered and received in evidence.

During the struggle I shoved the gun, or rather hit it with the point of my hand, and shoved it farther out and he kept jerking on me with his arm under me, but I had hold of his arm until we got

---

*1 In the beginning Green testified that the first time he seen the petitioner that petitioner was down under the pile of lumber; note above his charge that petitioner was on one knee by the lumber.

out from under the pile of lumber, then we broke loose and I started toward the northeast door. I was trying to get away from him. He followed and I had gotten about the point where the pile of lumber comes up the aisle leading from the northeast door to the southeast door, he reached down and he picked up this body stake and he drew back and let the stake drive at me. It went over my head and hit the window. At that time I broke loose and ran through from the southeast door to the southwest door and down to the sub-station where I called the guards. Government's Exhibit 11 For Identification, which you show me, is the stake that I refer to. It was lying on top of the pile of steel where it hit the window.

Whereupon, Government's Exhibit No. 11 was offered and received in evidence.

The place that you mark G-6 on the map is the location of the window that the stake struck. Government's Exhibit No. 5 shows the broken window where the stake hit. This is a picture of me pointing to the spot where the stake hit. I reported the incident to the yard police. I gave a description of my assailant to the agent of the F.B.I. as soon as they came out there. They got there I should judge, around 3:00 o'clock in the morning, between 2:30 and 3:00. I was a little nervous at that time. Physically I was O.K. after this incident outside of my arm was twisted a little. I went to the first aid station. My clothing was pretty much mussed up.

It was dirty from material picked up during the struggle.

The first time I saw the defendant he was 4 feet from me. When Mr. Moran came I went over the situation with him. Before Mr. Moran came I went back to the building with the captain of the guard and went to the place where I first saw the defendant. Then I noticed that the oakum was piled under the lumber, that is, the oakum that is shown in Government's Exhibit No. 1. I also at that time visited the locality of the window where I heard the crash. I noticed the window was broken and found the stake there which is Government's Exhibit No. 5 For Identification. Government's Exhibit No. 4 For Identification which you show me, depicts the condition of the lumber at the place where the oakum was found. There is about 4 feet from the floor as you are standing there where the lumber goes over and the aisle extends back about 8 or 10 feet. It extends (indicating on Government's Exhibit No. 4) back here and from this pile of lumber here out to this aisle would be around 12 or 14 feet. Oakum is also kept at the south end of the building in one corner. There is little supply shop or office in that corner. Hopeman Bros. Warehouse was merely being used for storage. I have never, during my visits there, seen oakum being used in or around the lumber. It is kept separately by itself. Employees come in and out of the warehouse. I was supposed to keep those out who were not employed by Hopeman Bros. Others who had no business there came in there also.

After this occurrence on the early morning of the 28th I next saw the defendant three or four days later at the Oakland City Jail. I do not remember just how soon it was afterwards Mr. Moran took me in to look at him. He only took me there on one occasion. Before I went there I had been shown by Mr. Moran a number of photographs. I don't know how many there were. There were quite a number of them and looking through them I ran across the photograph and said I would like to take a look at the man in person.

Government's Exhibit 8(a) For Identification which you show me is a similar photograph to the one that was exhibited to me.

Whereupon Government's Exhibit 8(a) For Identification was offered and received in evidence.

Government's Exhibit 8 was shown to me with the other photographs and I picked it out from amongst the number of photographs that were shown me. When Mr. Moran arrived there at Hopeman Bros., there was a quantity of oakum still in the place as shown in Government's Exhibit No. 1 which Mr. Moran took charge of.

Whereupon, Government's Exhibit No. 12 For Identification was offered and received in evidence.

At the time that I had the struggle with this man he had on a brown jacket with leather on it. I am not sure just what color his trousers were. He had no hat on. I believe that his shoes were dark. I believe at the time that he wore dark shoes. I did not notice whether they were low cut or high cut. I

later saw the defendant and identified him at the Oakland City Jail.*[2] Mr. Moran was with me. Mr. Moran was with the defendant in a room and I was outside. Mr. Moran caused the defendant to assume different positions for my benefit and directed me to observe him. At the time that Government's Exhibit 8 was exhibited to me I identified the defendant from the picture. I do not remember how the defendant was dressed the day I identified him in the jail at the Court House building in Oakland. Government's Exhibit 9(a) which you show me is the same jacket that the defendant wore when I saw him at Hopeman Bros., and the defendant is the person with whom I had the tussle that evening and the person whom I saw with the lighted match near the oakum.

Cross-Examination

The last time I saw the jacket which you show me was on the morning of July 28, I recall now, I believe, that I saw it at Angel Island when I went over there to identify the defendant the second time. My best recollection is that while we were at Angel Island Mr. Moran had the jacket and showed it to

———

*[2]Witness Green was brought to the Oakland City Jail by Mr. Moran and instead of placing the defendant with a group of other persons for the purpose of allowing Green to identify the defendant, Mr. Moran confined defendant to a section where Green could observe the defendant in different positions, which method of identifying defendant violates all ethics and principles of law. (See Transcript of Record Pages 29-30.)

us. Mr. Moran had it in his possession at Angel Island before I saw the defendant that day. He showed me the trousers, or ones similar to them, but I never was positive about the trousers he had on. He showed us two pairs of trousers and the jacket at Angel Island. I do not recall how the defendant was dressed when I saw him in the county jail because I was looking through a little hole right at his features or his face and I did not pay any particular attention to the type or color of clothes he had on that day. When I saw him at Angel Island he had on rough clothes but I do not recall what color. He had a shirt on. He did not have a jacket on that day. I have not been shown a full leather jacket that is supposed to have been worn by the defendant. I said in my first identification of him that he wore a jacket containing leather in it, not a full leather jacket.

On the morning of this occurrence I made a written report to my employers in which I gave a description of the man who assailed me. I do not know where that original report is nor do I have it with me. The report was made to the police department.

I first saw Mr. Moran the morning of the occurrence. The next time I saw him in connection with this investigation was a day or two after the occurrence. I am not absolutely certain whether it was the second, third or fourth day that Moran got in *touch me* and asked me to go to the city jail with him that he asked me to identify or try to identify

the defendant. I have no recollection whether it was one, two or three days. My best recollection is *that was* two or three days, or two, three or four days after the incident; I don't know whether it was a week later or not. I know it wasn't two weeks later. *I* could have been within ten days. I said it was on the second, third or fourth day. If Mr. Moran testified that it was a month later, I don't think Mr. Moran could have been mistaken. In my mind it was the second, third or fourth day.

Mr. Moran exhibited a number of photographs to me out of which I picked a photograph of the defendant. I would say that he showed me between 100 and 150 photographs. I do not recall just when it was but it was before we went to the Alameda County jail and about two, three or four days after the incident. He showed me all the photographs at one time, including Government's Exhibit 8(a) and I went through all of them and picked that one out as the one that resembled my assailant. I do not recall Mr. Moran showing me Government's Exhibit 8(a) alone. If Mr. Moran testified that he showed Government's Exhibit 8(a) alone, I would not say that he was mistaken. If he said he showed me this single photograph of the defendant alone and the next day he took me to the Alameda County Jail to show me the defendant, I would not say that he was mistaken, but I don't recall him showing me any one single photograph. I know that the photograph I picked out was among the ones that he showed me I don't recall when it was that I picked this one out.

I don't recall whether it was a week or a month after wards, nor do I recall the number that he showed me at that time. I didn't count them, but I am as positively certain about my identification of the defendant as I am about the number of photographs that were shown me. I am positive of my identification but I am not positive of the number of photographs that I was shown. I became positive of my identification the day I saw the defendant in the Alameda County Jail. When shown the photograph I made the statement that I would like to take a look at the man in the photograph. That is, I had picked the photograph out from a number without any assistance from Mr. Moran, fingerprinting department at the shipyard.*[3] They were handed to me and I was asked to look through them. Moran asked me to look through them for the purpose of picking out one that resembled my assailant, and I said I would like to get a look at the man in the picture. Moran did not tell me who the man was nor whether or not he was in custody. I told him the picture was very similar to the man I had the tussle with in the warehouse. At the time I picked out the photograph I did not say whether or not he was the man that I had the struggle with. There wasn't any doubt in my mind when I picked out the photograph. I just stated that I would like to get a look at him. When I made the request for a view of the man whose picture I had picked out I was not certain that the man in the picture was my assailant. The picture was very similar to the man sitting there

(indicating the defendant in Court). My state of mind at the time the picture was shown to me was that the person depicted was very similar to my assailant.*3)

On the morning of this incident during the struggle a gun was exhibited. I was not armed at that time. The gun that was exhibited was an automatic pistol. I am familiar with firearms having had thirty years experience with them. The gun looked like a Remington Automatic. It appeared very close to a 38 Colt automatic. I would say it was a Colt. I last saw the revolver when I got it from under my assailant when it was lying under the pile of lumber.*4) We both got up together and at that time the gun was still on the floor. I then backed out from the warehouse facing the assailant, he moving up towards me all the time, and then he picked up the stake and threw it. I walked out of the warehouse down to the substation and called the guards. I do not know what my assailant did. I returned from the sub-station with the Captain of the guards and some men to whom I related the things that had happened. We went

---

*3) It is obvious that fingerprints were taken but failed to prove to be those of the defendant's and were therefore not made known at the time of trial. No doubt whoever the man was that struck a match near the pile of lumber left fingerprints. Also the stick which Mr. Green claims was hurled at him by the same man, after, or during the struggle, and which he Mr. Green turned over to the investigating officers. One may well ask what did the fingerprints show.

back to the place where the struggle occurred and were standing there when we noticed the oakum stuck back under. That was the first time that I had seen the oakum. We looked for the gun right after we came back but did not find it. When I got up there the glass was broken I looked for and found the stake on the top of a pile of steel.*4)

I went over to Angel Island because I was asked to do so by Mr. Moran to take a look at the defendant. I had already seen him and identified him. It was October when I went to Angel Island with Mr. Moran and Mr. Kaylor. Moran wanted me to take a look at the defendant again. Prior to the time I went to Angel Island I did not know Mr. Kaylor. I had seen him. I knew he was a taxicab driver. When I went to Angel Island I went into the room where they had the defendant. Mr. Moran was there. No one else was there. The defendant was sitting down when I went in there was no conversation between us. I took a look at him and said, "this is him." I believe that I said when I went in to Moran that I believed this is the man that I had accosted in the Warehouse. Mr. Moran did not say anything. The defendant started a

---

*4) Green testified that the gun was under the defendant and defendant was under the pile of lumber and that he got the gun from under the defendant. However, Green by his own testimony refutes his own statement that he got the gun from under the defendant, in that, he states (R. 86), that "we got up together and at that time the gun was still on the floor."

cussword at me and jumped out of the chair he was sitting in. I think he said I was a dirty liar or a damned liar, or called me a liar or something similar to that. I have no recollection of the type of shoes the person had on the morning of the assault. He was down on one knee and went up and I did not pay any particular attention to the shoes. I do not recall any statement between Moran and the defendant at Angel Island regarding his shoes. I left the room right after the defendant called me a liar.

Redirect Examination

The first time I saw Government's Exhibit 8 I stated that the picture was similar to the defendant. I made only one trip to the Oakland City Jail to see the defendant and it was shortly after I had been shown the picture. I do not recall whether I was shown this picture once and I picked that picture as one resembling the defendant. I am confident that the defendant on trial is the man with whom I had the struggle on July 28.

Petitioner respectfully urges that the above testimony of William H. Green is the testimony settled by the bill of exceptions and does not show the whole of the testimony. William H. Green in the beginning testified that the first time he seen the petitioner that petitioner was under a pile of lumber. Later he testified that petitioner was down on one knee at the time they struggled in the Warehouse. Under the above testimony an innocent man was convicted and sentenced for a term of thirty

years, in that, there is no evidence of proof that any one had committed any crime against the laws of the United States. The fact that petitioner was a German prejudiced him with the jury and though innocent he was convicted because no other person could be found by the F. B. I. that would fit the case so perfectly as the petitioner. William H. Green was not telling the Court the truth about the first time he seen petitioner because the facts are that the Witness, William H. Green, was taken to the Alameda County Jail by Robert H. Moran, an agent of the Federal Bureau of Investigation, and told to identify the petitioner. It is therefore urged that the testimony of Witness Green showed that a match was struck but it does not show that a crime was intended or attempted by anyone. The striking of the match did not establish the corpus delicti. In Underhill's Criminal Evidence, Fourth Edition, page 41, at Chapter 4, Section 35, it is held:

"Proof of corpus delicti—General requirements. —To convict one of crime, proof must be made that the offense was committed and also that the accused was the perpetrator or one of the perpetrators of the offense, Case Cited * * *.

"Corpus delicti" is the body of the crime or the offense, cases cited, and this usually includes the agency of the accused, cases cited. However, strictly speaking, "Corpus delicti" means actual commission of a crime and some one criminally responsible therefor, Cases Cited, and proof of de-

fendant's connection with such crime is not part of the corpus delicti, cases cited.

"Proof of the corpus delicti is essential to a conviction, cases cited, must be proved beyond a reasonable doubt, cases cited, and must exclude every hypothesis other than a crime was committed in order to convict." Cases cited.

In the case at bar the mere striking of the match did not establish the corpus delicti, (a) because it could have been struck for the purpose of smoking and, (b) it could have been struck for the purpose of observing the place because of darkness without any intent on anyone's part to set fire to the warehouse as alleged in the indictment. The indictment charges that petitioner did attempt to set fire to certain warehouses. The evidence shows that the petitioner struck a match but nowhere does the evidence show that an overt act was committed to make the crime complete so as to be cognizable in a Federal Court. It is obvious that if a man had in mind to set a fire and later was prevented from doing so that no crime was committed. The same rule applys where a man has in mind to commit a crime and prior to its commission he abandons such intent, that is, he cannot be punished unless he carries into execution the intent to make the attempt complete under the statute. See the Supreme Court's decision in Jerome v. United States, 318 U.S. 101, in construing federal statutes. In the case at bar your petitioner respectfully urges that the only evidence shown by the testimony was the striking of

a match. This was not sufficient to support a conviction in the case at Bar. See Cox v. United States, Cir., 96F (2d) 41, therein the Court held:

"* * * Evidence which is consistent with two conflicting hypothesis tends to prove neither, Gunning v. Cooley, 281 U.S. 90, 94, 50 S. ct. 23174 L, Ed. 720; Stevens v. The White City, 285 U.S. 195, 204, 52 S. ct. 347, 76 L. Ed. 699. Svenson v. Mutual Life Ins. Co. of New York, 8 cir., 87 F. (2d) 441, 443; New York Life Ins. Co. v. King, 8 cir., 93 F. (2d) 347, 353; and proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction. Spalitto v. United States, 8 cir., 39 F. (2d) 782, 784; Van Gorder v. United States, 8 cir., 21 F. (2d) 939, 942; Cravens v. United States, 8 cir., 62 F. (2d) 261, 274; McChintock v. United States, 10 cir., 60 F. (2d) 839, 842."

The Court goes on to say:

"* * * However, where it clearly appears in a criminal case that a defendant has been convicted of an offense which the evidence fails to show was committed, the error of submitting the case to the jury for determination is so plain and vital that this court is at liberty to and will reverse even in the absence of a proper motion and exception, not because the defendant has a right to demand a reversal, but solely in the public interest and to guard against injustice. Wilborg v. United States, 163 U.S. 632, 658, 16 S. ct. 1127, 1197, 41 L. Ed. 289;

Ayers v. United States, supra, 8 cir., 8 F. (2d) 607, 609, 610." [Emphasis supplied.]

Petitioner earnestly submits that the court as well as the jury was prejudiced, which prejudice arose out of news paper articles published showing that petitioner attempted to sabotage buildings where war material was being produced where, as here, there was no attempt to sabotage any buildings in that the evidenec clearly shows that some one struck a match, which striking of a match did not constitute a crime under Title 50 U.S.C.A. section 102. The mere striking of the match failed to establish the corpus delicti and there was no evidence sufficient to convict, therefore, the judgment and sentence must be set aside and the verdict quashed and a new trial granted, or vacated set aside and held for naught.

For the purpose of showing the sharp conflict of testimony of the Government witnesses and for the further purpose of showing that witness Green could not have possibly identified this petitioner, it is here shown by the Government's own witness, a one John Cupple who was at the place where the supposedly alleged offense was committed, that is, the said John Cupple was within twelve feet of the person who struck the match and testified as follows:

My name is John Cupple. I am a leader man or carpenter at Richmond No. 2 for Hopeman Bros. I am familiar with the location of the various buildings in the plant there. There could be more

than one shipfitting shop or pipe shop in Richmond shipyard No. 2, but the main pipe shop is located right by the Hopeman warehouse, possibly 10 feet away. It is a parallel building. I was employed there on the 28th of July this year. At that time I was a leader man and was in the warehouse to get material for the ship. I was working on the graveyard shift, that is, from 11:30 p.m. to 7:00 o'clock a.m. I had a helper but he was not in the warehouse. When I noticed the incident there were other persons in the warehouse, a truck driver and a truck driver's helper. The truck driver's helper was a man named Pacheco. I, myself, cannot identify the defendant on trial here. The incident that happened was this: I was standing there and I just simply asked who the fellow was. Of course, I could not identify the man. I asked Pacheco who the fellow was. I asked Pacheco and the truck driver who he was. We were all there in the warehouse at the time the incident arose and I just happened to ask who the fellow was as the fellow walked through the warehouse. I do not know who the man was and I couldn't identify him. The conversation occurred in this way: A person that kind of aroused our curiosity. He happened to be a rather well dressed fellow like some high official, you know. It just came from a blue sky, who this guy would be. Well, it just came to me that this was some official of ours that was coming through our warehouse, so that is show it aroused my curiosity who he was, so I asked who this fellow was,

otherwise I wouldn't have thought anything about it. There was no reason for anybody else to be in the warehouse. The truck driver was a man named Dick Darling. I don't know where he is now. At the time of the conversation we were standing in the tool room which connects with the timekeeper's office. The office is in the corner of the building and the tool room connects with it. I am familiar with the floor plan of the place. On Government's Exhibit 5 which you show me here is the office and here is the tool room. We were just standing inside of the tool room. When I saw the individual I would judge he passed about 12 feet from me, I wouldn't say exactly. (2)* I asked Pacheco who he was or who he might be. I wouldn't say he was really well dressed, but he was dressed rather nicely, not in a suit or anything like that. He passed by before I got a look at his face. I think he was medium build, a stocky built person. The fellow I saw was a stocky built person. He was just passing through.

Cross-Examination

When I saw this individual he was in the passageway going west in front of the office to the outer door. On the floor plan that you indicate to me the office is approximately to where you are pointing.

---

(2)* Witness Green testified the person was six feet tall and weighed 180 pounds; here Cupples testified that he observed the person from twelve feet distant and that such person was of medium build, a stocky fellow.

This is the office (indicating on floor plan), and we were at this point here at the time I noticed him. He was travelling in this direction but due to the fact that I had no reason to watch him any further or pay any attention to him, that is the last I saw of him. The person I saw was walking at a fast pace. He was just simply walking along and then all of a sudden I didn't see him any more. I saw a person passing by that was a stranger to me and there was nothing about his action or manner that caused any concern in my mind. I can't really describe anything about his dress. My impression is that he could have been an officer of the company. He wasn't dressed in dark clothes. Usually when we work over there we wear overalls or a jacket with work trousers. The workmen dress in different manners and it is quite a common thing there for the men to wear jackets such as Government's Exhibit 9a. I don't think the person I saw that evening had a jacket on like Government's Exhibit 9a. My recollection is that he was stocky build and of medium height. I would judge him to be about 5 feet 10 inches and I suppose he would weigh about 170 pounds.

An incident occurred there that evening that I heard about later. I know Mr. Moran, the gentleman who sits at the counsel table behind Mr. Licking. I have talked to Mr. Moran in connection with this case. He questioned me concerning my knowledge of the incident and he asked me to describe the person I had seen, and I gave him the

same description that I have given here. He exhibited certain photographs to me. I have not seen Government's Exhibit 8a which you showed me, before.

Whereupon at the request of counsel for defendant, defendant Roedel was requested to stand.

I have no recollection of seeing this man who is now standing in the Court room (the defendant) other than on Angel Island when I went over there. I do not recall seeing him in the plant of the Richmond Shipyard.

Whereupon the following statement was made by Mr. Licking, the Assistant United States Attorney:

Mr. Licking: No question. If the court please, I have no more witnesses; the Government closes at this time. I would like, however, with the understanding, of course, that if the evidence at this time is deemed insufficient we might have an opportunity of calling a further witness, which would not have any effect upon any rights the defendant has at this time; but it is my intention to find the truck driver who was there, if I can. At the present time they shift around and it is difficult to find him; it is my intention to have him here, although he cannot—he is in the same position as this man Cupples, he cannot identify the defendant. He was there at the time. But I don't want any adverse inference to be drawn to the effect that he is not produced, and I want to try to produce him at a later date if I can find him.

Mr. O'Connor: I understand your present posi-

tion to be that you have made an effort to locate the man and cannot.

Mr. Licking: That is true.

Mr. O'Connor: I will stipulate that if he were called he could not identify the defendant.

Mr. Licking: He cannot identify the defendant. He simply saw the individual walk by and he was shown the photograph, as was this witness, and he could not identify him.

Mr. O'Connor: I will so stipulate.

Whereupon it was stipulated between counsel for the Government and counsel for the defendant that the defendant was employed from April 25, 1942, to May 27, 1942, as a shipfitter's helper, and that he was so employed at Richmond shipyard No. 2 as a shipfitter's helper until the Immigration authorities on a Presidential warrant, charging him with being an alien enemy.

Whereupon the Government rested its case.

Whereupon the defendant moved the Court for a directed verdict of not guilty on the ground that the evidence was insufficient, which motion was by the Court denied.

It is respectfully submitted that since witness Cupples testified that petitioner was not the man the night of the alleged incident, that witness Green had been directed to identify the defendant in Court in that witness Cupples testimony was in conflict with the testimony of Witness Green and, petitioner will point out to show this Honorable Court that Witness Green was showed petitioner at the

time petitioner was singled out of a line-up, to wit, the record discloses that:

On that morning I had an interview with Mr. Green and with the Chief of Police, Mr. Walls. I subsequently talked to another employee and a Mr. George Pacheco. He is employed there as a truck driver's helper.

On August 19 I had an interview with Mr. Green and at that time I exhibited to him a photograph which you now show me. The photograph is one of defendant Heinrich Roedel. On August 20, I arranged that Mr. Green should go to the Alameda County Jail in the Court House and at that time Mr. Green was brought into the visitor's cell at my request. There is a glass on one side and a door with a slot in it on the other. At that time Roedel and I went in the room together and I had a conversation with him. At my directions he assumed various poses sideways and frontways and in the meantime Mr. Green was observing the defendant through the slot in the door that I have mentioned.

Whereupon the photograph referred to was marked "Government's Exhibit No. 8 for Identification."

I had a second conversation with George Pacheco on August 20. I did not exhibit to him at that time the photograph "Government's Exhibit No. 8 for Identification." On August 20 at the Alameda County jail George Pacheco was placed outside the door with the slot in it, and Mr. Roedel was brought into the room and I had him assume various poses

sitting and standing, a profile view and a front view, while Pacheco looked in from the side through the slot. Prior to that time Mr. Pacheco had not been shown the photograph of the defendant.

I later had a conversation with a taxi driver named Lawrence Kaylor, who drove for the Owl Cab Company in Richmond. In connection with my first conversation with him I showed him the photograph, "Government's Exhibit No. 8 for Identification." That was in October, 1942.

* * *

Petitioner respectfully contends that on Moran's first visit he had Witness Green with him and that Witness Green viewed petitioner as singled out in a separate room. However, no identification was made at that time and, on October 2, 1942, Moran returned with Witness Green and a one Larry Kaylor, a taxi driver. Witness Green then stated that petitioner was the man with who he had struggled with in the warehouse. But it has never been a rule in such cases to single out a man alone for the purpose of making identification. Here Moran concedes that this method is unusual, in that:

"In this case, I did not put several persons in a room and ask the prospective witness to be brought in and to pick out the person he thought guilty."

Petitioner respectfully submits that Green's testimony is in direct conflict with the testimony of Witness Cupples. It is respectfully submitted that if Cupples could not identify the petitioner neither could Witness Green and that Witness Green could

not of identified petitioner without first being told to do so by Moran. In Cox v. United States, supra, the court speaking on the subject of conflicting evidence held that:

"* * * Evidence which is consistent with two conflicting hypothesis tends to prove neither, cases cited in support thereof." (See Cox v. United States, cited Supra.)

VII.

Point Three

Petitioner Was Not a Member of the Storm Troopers

Petitioner respectfully urges that there was no evidence or proof that he was a member of the Storm Troopers, in that, the Government in its brief in this Court in Roedel v. United States, 9 Cir., No. 10,435, stated petitioner admitted that he was a member of the Nazi and a Storm Trooper (Br. 2). The record in the case at bar clearly shows that petitioner testified, to-wit:

Tr. p. 118: "From his talk with me, I find out that he found this card. I did not know it was in the case. I had a lot of sport medals that I had won in Germany. I didn't know about that swastika pin. Moran asked me why I had not told him before that I was a Storm Trooper, and I told him that I had never been a storm trooper and he asked me if I ever did any Storm Trooper duty, and I told him no, and that I never had any uniform on. The card which you show me being Government's Exhibit 8-B

is a temporary permit in the Marine group. It is a kind of a party, S. A. and it has been signed by the head man or Fuehrer of the Marine Storm. The name of the man who signed it is Wolf. I got this card in Bremen before I sailed the last time. In 1933 when I was at my grandparent's home, I told my grandfather that I was going back to sea and that I was going back to the United States as soon as I could, and I went to North German Lloyd Line. I asked my grandfather to sign a letter to a man named Scrader, whom he knew and who was with the North German Lloyd. If you had not been to sea for a period of a year or more, the North German Lloyd could not employ you as a seaman unless you had special permission. All men on board belonged to the S. A. Marine Storm. They have to take a course in everything you do on ship, how to handle the ship in case of storms, how to handle lifeboats, to study your compass, and what to do in case the ship catches fire. I got this card after I joined the Marine Storm. I did not have to pass an examination or go to school—it was just a temporary permit. I don't think it is even good for six months. All sailors at that time had to belong to the S. A. to get a ship. I think I paid $2.00 but I am not sure. It is not a union—there is only one union in Germany and that is the Labor Front. They control everything.

The medal object which you show me (Government's Exhibit 8-C) is a swastika emblem. It is a special emblem for the Marine Corps. On German

Navy ships, they wear these. They have got that same flag—it is special for the Marine Group. The emblem badge which you show me, Defendant's Exhibit D, is something I got in New York. These flags are Irish flags. I remember at the time I was in New York, 1928, a plane came over from Germany, flying from East to West, with Fitzmore an Irishman, and a German Baron, and they were in a car and drove all around New York and people bought these flags. I bought the emblem badge on the street in New York when the fliers came in and had a parade. The picture that you show me I had made in New York and the flag that is on it I had put on in Japan. The pin that you show me is a S. A. pin. I never noticed that these things were in the box.

I have not at any time been a member of or been employed by or been in service of any German organization or the organization of any foreign power for the purpose of or instructions to do any damage to any property or person in the *in the* United States. I came back in 1936 because I like this country. I played with boys from America when I was a kid in my home town. That is why I like this country. I was not within the confines of the Richmond Shipyard No. 2 in Richmond, California, on the night of July 27 or the early morning of July 28." (Tr. 118-119-120.)

The above and foregoing testimony of the petitioner refutes the Governments claim that petitioner admitted he was a member of the Nazi Party and

a Storm Trooper. In the Government's Brief, at page 2, counsel states that petitioner admitted that he *was member* of the Nazi Party and a Storm Trooper and cited the record at page 31. However, counsel forgot that at page 31 of the record that such testimony was that of Robert H. Moran, a member of the Federal Bureau of Investigation.

Petitioner respectfully urges that the Government's offer of the S. A. pin, and the swastika emblem, was for the purpose to establish prejudice with the jury and did not have any relationship to the crime for which petitioner had been indicted and for which he was being tried. The Statute (50 U.S.C.A. Section 102) is not restricted to enemy aliens, in that, such Statute makes it a crime for any person that may violate that section, to wit:

"When the United States is at War, whoever, with intent to injure, interfere with, or obstruct the United States or any associate Nation in preparing for carrying on the War * * * shall wilfully injure or destroy, or shall attempt to so injure or destroy, any war material, and etc. * * *."*

Therefore, such admission of the S. A. pin, and the swastika emblem, was prejudicial error because it influenced the minds of the jury to render a verdict (not on the evidence) but namely because the jury believed petitioner to be a member of the Nazi Party and a Storm Trooper. It is urged that such articles aforesaid were not a part of the res gestae and was reversible error to admit such articles for

prejudice only. In this respect your petitioner relies upon

Underhill's Criminal Evidence, Fourth Edition, at page 149, section 115:

"The propriety and justice of permitting articles and implements, such as deadly weapons, lanterns, masks, counterfeiters' tools, gambling apparatus and the like, used by criminals, but which are not shown to be connected with the accused, to be exhibited to the jury may well be doubted. Such a practice, under the pretext of illustrating or explaining evidence, is well calculated to prejudice the jury against the accused. Generally where the sole purpose is to arouse prejudice, pity or other passion, and no legitimate aim is served, it is error to admit articles thus offered. Cases cited. Lack of some sort of identification or connection with the crime, a plea of guilty, failure to shed any light on an issue, or failure to show condition unchanged, are other grounds of barring articles from admission as evidence." (Cases cited.)

In the case at bar the Court overruled objections to the Government's admission of the articles into evidence; exceptions were taken and noted in the record. Petitioner respectfully submits that such articles prejudiced him with the jury and, by reason that such articles did not connect with the crime charged in the indictment that they were admitted solely for the purpose to prejudice him with the jury and was reversible error.

VIII.

Point Four

Petitioner Was Deprived of the Right of Filing of Petition for Writ of Certiorari in That His Counsel Misrepresented the Law Governing the Time Element Under the Federal Rules of Criminal Procedure

Petitioner respectfully contends that this point is raised separately from the judgment of conviction and sentence in that his remedy to apply to the Supreme Court for Writ of Certiorari was denied him because his counsel did misrepresent the law on the time element for filing of Writ of Certiorari and therefor petitioner was deprived of the effective assistant of his counsel in the course of his appeal and that the proceedings had in the United States Court of Appeals were void and its judgment should be vacated as though no appeal had been taken from the judgment of conviction in this Honorable Court and, by reason alleged under points, one, two and three, the said Judgment and sentence should be vacated set aside, and for naught held, and the verdict of the jury quashed in accordance with law as heretofore cited above, in that:

Title 28 U.S.C.A. Section 391 provides that:

"* * * On the hearing of any Appeal, Certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not effect the substantial rights of the parties." (Emphasis supplied.)

The right to "assistance of counsel" is assured in federal prosecutions by the terms of the Sixth Amendment, the Supreme Court has progressively added substance to the right by requiring that assistance be effective. Glasser v. United States, 315 U.S. 60 (1942): see United States ex rel. Mitchell v. Thompson, 56 Fed. Supp. 683, 686-87 (S.D.N.Y. 1944). And by identifying as significant such elements as; and the presence of and uncompromised efforts by counsel at all stages of the proceedings. Glasser v. United States supra; see United States ex rel Hall v. Ragen, 60 F. Supp. 820, 824 (and this includes a court-appointed attorney). Johnson v. Zerbst, 304 U.S. 458 (Sixth Amendment). Procedure.

Rigid "record worship" Pound, Appellate Procedure in civil cases (1941) 35: Note (1943) 56 Harv. L. Rev. 1313 on appeal entrenched both judicial oblivious to the distinction between incapacity and incompetence, and reluctance to grant a new trial for lack of effective assistance of counsel. The restriction to evidence appearing in the record has prevented defendants from marshalling proof of the denial of the right before the appellate court, and has created, innumerable precedents for denying new trials for alleged incompetence. Thus, the rule for ineffective counselling would not result in a new trial became further embedded, even where the allegations went to the capacity of counsel, unless the defendant has shown that he was seriously prejudiced, new trials have been ordered for: failure to

object to wholly prejudicial and irrelevant evidence, where evidence was close, and the court permitted the prosecution to take advantage of defendant (People v. Gardiner, 303 Ill. 204, 135 N. E. 422): failure to present proof or to impeach witnesses (People v. Shulman, 299 Ill. 125, 132 N. E. 530). This insistence by appellate courts on prejudice in the record makes the requirement of competent counsel no more than a device to all attacks on harmful rulings not excepted to below: If the court is to be restricted to prejudicial errors in the record by which hypothesis would result in a new trial, the only effect of offering proof of incompetence is to free the defendant from the need to except when the harmful rulings are made. People v. Gardiner, supra; see People v. Pierce, 387 Ill. 608, 614-615, 57 N. E. (2d) 345, 348.

One procedural device, Writ of Error Coram Nobis (Now Motion) avoids the procedural rigors which diminish the utility of appellate procedure to attack a conviction People v. Butterfield, 37 Col. App. (2d) 140, 99 P. (2d) 310. A motion for a new trial allows evidence other than that appearing in the record of the original proceedings to be presented E. G. Cordova v. State, 190 S. W. (2d) 826 (Tex. Cr. App.). Where such a motion is based upon newly discovered evidence, proof of incompetence or negligence of the attorney in searching out the evidence sometimes relieves defendant of the requirement of "due diligence" that would otherwise have defeated the motion. Johnson v. United

States, 110 F. (2d) 562 (app. D. C.). (Counsel appointed by court.) See People v. O'Brien, 110 App. Div. 26, 96 N. Y. Supp. 1045 (2d. Dept. 1905). The writ of error coram nobis, or its statutory analogue is an apt procedure for raising the issues, since it permits the introduction of evidence probative of incompetence of counsel as an ingredient of his constitutional rights, a defendant in a criminal action is assured effective assistance of counsel. ' This assurance may be absolutely or conditionally construed. The requirements of a smooth functioning system of criminal justice necessitate distinguishing between incapacity, an absolute cause for reversal, and professional ineptitude, a bases under certain conditions. Besides uncritical substantive treatment, procedural fetters have eroded the requirements of effective assistance where a conviction is attacked on these grounds. However, procedures are available to challenge a conviction in which the defendant was not competently represented, and under the better reasoned decisions of the Supreme Court, new trials should be ordered if the facts meet the suggested requirements. There is no need to restrict the procedure for raising these issues to appeals; and no reason to limit the scope of other available procedures by precedents born of "record worship." See, Notes (1947) 1 Col. L. Rev. 115, 116, 118, 120, 121, 122, 123.

In the case of Thompson v. Johnston, 9 Cir., 160 F. 2d 374, the court in the majority opinion held that if Thompson had of shown any prejudice that

habeas corpus would lie to release him, the court's opinion states at page 375, that:

"The petition here shows no lack of evidence of guilt, no error in the conduct of the trial, nor any other circumstance which might have warranted a reversal had an appeal been taken, that is to say, there is an entire absence of any showing of prejudice. In this posture of affairs the dismissal was proper. CF. Miller v. Sanford, D. C. 59 F. Supp. 812, and same case on appeal, 5 Cir., 150 F. (2d) 637, Certiorari denied 326, U.S. 787, 66 S. Ct. 472. We do not mean to intimate that if there had been a showing of probable cause for an appeal habeas corpus would afford an appropriate corrective; case cited in the footnote. We express no opinion as to that." (Emphasis supplied.)

In the case at bar petitioner urges that he had written out certain facts and assigned certain grounds for reasons of applying for writ of Certiorari but his Counsel advised him that he had plenty of time as Certiorari could be applied for within ninety (90) days. Through such misrepresentation petitioner lost his right of appeal on Certiorari. That having shown prejudice heretofore and upon the majority of the Court's opinion in Thompson v. Johnston, supra, petitioner turns to the dissenting opinion of the Honorable William Denman in the Thompson case in that the law is applicable stated in connection with this point; there, as here:

"The Court's opinion decides an important question of Constitutional law contrary to the decision

of the Supreme Court in Cochran v. Kansas, 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453; Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, and McCandless v. United States, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

It further decides a question of constitutional law in conflict with the law as stated by the Court of Appeals for the District of Columbia in Boykin v. Huff, 73 App. D. C. 378, 121 F. (2d) 865. It also overrules sub silentio the decision of this Court in Wilfong v. Johnston, 156 F. (2d) 507.

This Court's opinion holds that though a sentenced man, desiring to exercise his constitutional rights to access to counsel and to file notice of appeal, has been prevented from — exercising such rights by the wrongful acts of the Attorney General's agents and thereby lost his appeal, his petition for a writ of habeas corpus must be denied if it do not show the errors in his trial he would have relied upon if he had taken the appeal. See footnote infra.

That is to say, though Thompson show his constitutional right to due process has been denied, in addition he must show affirmatively that the denial has been prejudicial. The law is exactly the contrary. 28 U.S.C.A. Section 391 provides

"* * * On the hearing of any appeal, Certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Construing this provision in a civil case (hence, a fortiori, applicable here) the Supreme Court in McCandless v. United States, 298 U.S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205, states

"* * * That section simply requires that judgment on review shall be given after an examination of the entire record without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U.S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; Williams v. Great Southern Lumber Co., 277 U.S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761." (The underscoring is in the opinion.)

Citing to the above from McCandless Case, the Supreme Court, in Glasser v. United States, 315 U.S. 60, at page 76, 62 S. Ct. 457, 467, 86 L. Ed. 680, in reversing a conviction because of the denial of the assistance of counsel, states

"* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The case of Cochran v. Kansas, supra, reversing Cochran v. Amrine, 153 Kan. 177, 113 P. 2d 1048, also holds to the contrary of this Court's opinion.

The petition for the writ there stated no more than that the state prison authorities had prevented the petitioners appeal from his conviction. The Kansas Supreme Court held that the record of his prosecution showed he had no ground of appeal, stating at page 1049 of 113 P. 2d:

"* * * There is nothing in the record of the proceedings in the Court below to indicate any irregularity in the petitioner's trial and conviction, and certainly nothing to indicate that his commitment was void for any reason."

Nevertheless, because Cochran was denied access to counsel and his appeal thus frustrated, the case was returned to the Kansas Supreme Court for the determination of the issue whether he was refused the privilege of an appeal, the Supreme Court stating, at page 258 of 316 U.S., at page 1070 of 62 S. Ct.

"* * * However inept Cochran's choice of words, he has set out allegations supported by affidavits and nowhere denied that Kansas refused him privileges of appeal which it afforded to others. Since no determination of the verity of these allegations appears to have been made, the cause must be remanded for further proceedings."

In the habeas corpus proceeding of Boyhin v. Huff, cited in the Court's opinion, the record shows at page 869 of 12 F. 2d that Boyhin's petition stated no error in his trial and no more than "I wish to prosecute an appeal, inasmuch as there is an admitted possibility, however, remote, of a reversal of a decision." (The underscoring is in the opinion.)

In our recent decision of Wilfong v. Johnson, 156 F. 2d 507, Wilfong was sentenced in the absence of his counsel. We held the conviction valid but that the sentence should be set aside, though the petition made no claim that counsel's presence there would have made any change in the sentence. What concerned us (page 510 of 156 F. 2d) was that it was possible Wilfong's Counsel would have done something towards the amelioration of his sentence, just, as here, Thompson's counsel in all likelihood would have filed notice of appeal.

The relief here sought is that customarily granted in an equitable proceeding where a successful litigant wrongfully possesses a judgment it is not entitled to hold. I cannot see no difference between ordering the setting aside of a judgment procured by the wrongful act of the United States, the successful prosecuting litigant, as in the case of Anderson v. United States, 318 U.S. 350, 357, 63 S. Ct. 599, 87 L. Ed. 829, (footnote infra) and the instant case of the United States, the successful litigant, retaining its judgment made final through the wrongful acts of the custodial agent in preventing an appeal.

I further dissent from the Court's statement in the last paragraph of the opinion that the Cochran and Boykin cases have no application to the instant case because "The circumstances in Cochran v. Kansas, supra, were different. There the Court to which the matter was remanded for inquiry was the Court possessing jurisdiction to review for error the judgment of Conviction; and similar jurisdic-

tional situations existed in Boykin v. Huff * * *."

That is to say, if the Attorney General has confined a prisoner in the Eastern District of Tennessee where he was tried, his application for the Writ in that district might have greater validity because the Sixth Circuit Court of Appeal would remand the habeas corpus proceeding to the Court in which the petition was filed. The contention seems to be that since the Attorney General chose the Northern District of California as the place of confinement, the violation of the prisoner's constitutional rights are not to be considered.

This seems extraordinary doctrine. The only district Court in which the petitioner may file his Writ is that of the district where he is confined. Jones v. Biddle, 8 Cir., 131 F. 2d 853. (Emphasis supplied.)

Quoting further from Judge Denman's dissenting opinion, at page 378, that:

"I further dissent from the incredulity of the Court's opinion in its statement that Cochran v. Kansas and Boykin v. Huff "may be thought to throw doubt on the question whether the statutory right of appeal is not a part of due process as guaranteed by the Fifth Amendment." These cases following the statement of the Supreme Court in Frank v. Mngum, 237 U.S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969,

"* * * And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases * * * it is perfectly obvious that where such an appeal is provided for, and the

prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment," remove all doubts that a defendant in a federal criminal prosecution no more can be denied due process with reference to his appeal then with reference to his trial in the district Court."

In the case at bar the Certiorari petitioner was seeking was as applicable to the judgment of this Court, as it was of, that of the judgment of the Circuit Court, in that, it was possible that the Supreme Court would have reversed the judgment of conviction of this Court by its order of reversal of the judgment of the Circuit Court that affirmed the conviction of this Honorable Court. This Honorable Court cannot say that its judgment was free from error since there has been shown the sharp conflict of testimony of Witness Green and Witness Cupples.

Conclusion

It is respectfully submitted that in the case at bar an innocent man has been convicted upon the sole testimony of Witness Green, which testimony in part shows that Green was taken to the jail to view the petitioner, not in a line up, but in a cell singled out for that purpose which petitioner claims was wrong because it indicates that the department of justice just the same as said to Witness Green: "this

is the man we want you to identify and since you could not pick him out of a show-up, we think you know why the petitioner has been placed in a single cell." On the other hand, Witness Green could not have identified petitioner any more than Witness Cupples. In observing petitioner as he did "Witness Green" was not doing so for the purpose of identification but to learn of petitioner's action and the way he looked from different positions. This is an old method of framing the innocent, a method that was outlawed many years ago. The Government must sustain the burden of proof beyond a reasonable doubt before a conviction will be allowed to stand in a federal court. In the case at bar the Government failed to establish that petitioner was guilty beyond a reasonable doubt, in that, Witness Cupples' testimony overcome the testimony of Witness Green, notwithstanding that Witness Pacheco testified against petitioner in that Witness Pacheco's testimony was in direct conflict with the testimony of Witness Cupples. If the Government had of brought in Dick Darling then the testimony of Cupples would have been corroborated by the testimony of Witness Darling. The failure of the Government to produce the witness Dick Darling was a denial of due process of law petitioner was entitled to under the Fifth Amendment to the United States Constitution. Dick Darling's testimony was favorable to petitioner in that the Government stipulated that if Witness Darling was produced he could not identify petitioner. However, a failure of the Govern-

ment to produce Witness Darling gave the impression on the minds of the jury that there was no such testimony notwithstanding the stipulation of the Government that if Dick Darling was present he could not identify petitioner. The testimony of Dick Darling was for the jury and the Government could have no doubt found Witness Darling even at a later address if not found at the place where he had been living at the time he was employed as a truck driver, all of which is respectfully submitted.

Respectfully submitted,

/s/ HEINRICH ROEDEL,
Box 651—P. M. B.,
Alcatraz, California.

Prayer for Relief

Wherefore, your petitioner respectfully prays that this motion be granted and that this Honorable Court make its order directing the United States Attorney, to appear at a time and occasion thereat to be set forth to show cause, if any he have, why the foregoing motion should not be granted and the judgment and sentence vacated and for naught held, and the verdict of the jury quashed, and petitioner discharged from the custody of the Warden of the said United States Penitentiary, Alcatraz, California, and petitioner will ever pray.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B.,
Alcatraz, California,
Petitioner.

Verification of Oath

State of California,
County of San Francisco—ss.

Heinrich Roedel, having been first duly sworn, deposes and says: that he is the petitioner in the above and foregoing motion; that he has read and knows the contents of same; that the allegations contained therein are true and correct.

/s/ HEINRICH ROEDEL,
Affiant.

Subscribed and sworn to before me this 31st day of December, 1949.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

/s/ P. J. MADIGAN,

Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

PETITIONER'S EXHIBIT A

Richmond Independent
July 29, 1942

Attempt to Set Shipyard Fire Balked by Guard

A deliberate attempt at sabotage at the Richmond No. 2 shipyard early yesterday morning was foiled by a plant guard when he apprehended a man in

the act of lighting a fire to a large pile of kiln dried lumber, police revealed today.

The guard grappled with man, apparently an employee, but he broke loose and made his escape by intermingling with other employees in the plant.

A police investigation revealed that a pile of oil-saturated rags had been placed under the lumber. The fire was never actually lighted because the guard saw the would-be saboteur light the match and he ran to apprehend him.

FBI Investigates

Although shipyard guards have been making a minute search of the plant, the Federal Bureau of Investigation has also been notified. FBI officers declared today that a complete investigation is being made but offered no further comment. The Richmond police department is also aiding in the search.

Police declare that the pile of lumber is not the property of the shipyard proper but belonged to a subcontractor. If the lumber had burned it might have spread to a nearby warehouse, also owned by the subcontractor, but police doubt that it could have caused much damage to the main shipyard structures.

Because of the darkness between the piles of lumber, the guard who apprehended the man as he attempted to light the fire was able to get only a meager description. However, police declared an intensive search for the man will be continued.

PETITIONER'S EXHIBIT B

Office of the Clerk,
Supreme Court of the United States
Washington, D. C.

December 22, 1944

Mr. Henry H. Roedel,
San Francisco, California.

Dear Sir:

Replying to your recent letter, you are advised that it is not the practice of this Court to appoint attorneys to assist litigants in the preparation of cases to be filed in this Court. It is up to you to file your own case or to secure an attorney to file the case.

You have thirty days, exclusive of Sundays and holidays within which to file your case in this Court. There is no possibility of extending that thirty-day period.

Under separate cover I am sending you a copy of the Revised Rules.

Yours truly,
CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:ED
Via Air Mail.

PETITIONER'S EXHIBIT C

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.
13

January 10, 1945

Mr. Henry H. Roedel,
San Francisco, California.

Dear Sir:

Your application for an extension of time was presented to Mr. Justice Douglas who has endorsed thereon that the motion is denied "for lack of power to grant it."

It has been repeatedly held that a Justice has no power to extend the time in a case arising under the Criminal Appeals Rules. You have thirty days from the date of the judgment within which to file a petition for certiorari in this Court, or if a timely petition for rehearing was filed, thirty days from the date of the order denying that motion.

Yours truly,

CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:KEB

PETITIONER'S EXHIBIT D

Office of the Clerk,
Supreme Court of the United States,
Washington, D. C.
13

February 3, 1945

Mr. Henry H. Roedel,
Alcatraz, California.

Dear Sir:

Replying to your letter of January 28th I can only reiterate that it has been repeatedly held that a Justice has no power to extend the time in a case arising under the Criminal Appeals Rules. You have thirty days from the date of the judgment within which to file a petition for certiorari in this Court, or if a timely petition for rehearing was filed, thirty days from the date of the order denying that motion.

Yours truly,
CHARLES ELMORE
CROPLEY,
Clerk,

By /s/ E. P. CULLINAN,
Assistant.

EPC:KEB

[Endorsed]: Filed January 6, 1950.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO VACATE JUDGMENT AND SENTENCE

Inasmuch as the motion of the petitioner filed January 6, 1950, and the files and records of the case conclusively show that the petitioner is entitled to no relief, his motion to vacate judgment and sentence is hereby denied.

Dated: January 9, 1950.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Heinrich Roedel, in propria persona, the petitioner and appellant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying his motion to vacate judgment and sentence and to quash the verdict as made and entered on the 19th day of January, 1950.

Respectfully submitted,

/s/ HEINRICH ROEDEL,
P.M.B. 651,
Alcatraz, California.

Records at U. S. Peniteniary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

Subscribed and sworn to before me this 31st day of January, 1950.

[Seal] /s/ P. J. MADIGAN,
Associate Warden,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORDS ON APPEAL

To the Clerk of the Above-Named Court:

Please prepare and send to the said Circuit Court of Appeals for the Ninth Circuit the following papers and records, to wit:

1. Motion of Appellant's to vacate the judgment and sentence, etc.

2. Appellant's Exhibits A, B, C, and D.

3. Judge's instructions to the jury as originally given at time of trial.

4. Order denying motion to vacate judgment and sentence.

5. Notice of Appeal.

6. Designation of records and service thereon.

Respectfully Submitted,

/s/ HEINRICH ROEDEL,
Box 651—P.M.B.
Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Heinrich Roedel Is Not a Citizen of the United States.

Subscribed and sworn to before me this 31st day of January, 1950.

[Seal] /s/ P. J. MADIGAN,
Associate Warden,
Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1948, to administer oaths.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in the above-entitled case, in this Court, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Motion for Vacation of the Judgment and Sentence and to Quash the Verdict and Exhibits A, B, C and D.

Order Denying Motion to Vacate Judgment and Sentence.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Designation of Records on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12507. United States Court of Appeals for the Ninth Circuit. Heinrich Roedel, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 22, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12507

HEINRICH ROEDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant intends to rely upon the following points on appeal:

1. The indictment failed to inform the defendant (appellant) of the nature and cause of the accusation against him.

2. The evidence was insufficient to sustain a conviction against the defendant (appellant).

3. Appellant was not a member of the Storm Troopers and therefore such evidence was highly prejudicial and inadmissable.

4. Defendant (appellant) was deprived of his right to file a petition for a writ of certiorari, in short his counsel misrepresented the law governing the fine element under the Federal Rules of Criminal Procedure.

* * *

Appellant deems the entire records necessary for the consideration of this appeal:

1. Motion to vacate the judgment and sentence, etc.
2. Appellant Exhibit A, B, C, and D—annexed to above said motion to vacate.
3. Instructions given to the jury as originally given at trial.
4. Order denying said motion to vacate judgment and sentence.
5. Notice of appeal.
6. Designation of records.

Dated: This 15th day of March, 1950.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B. Alcatraz, Calif., Appellant in propria persona.

Proof of Service

I, Heinrich Roedel, appellant in the above-entitled action, hereby certify that on the 15th day of March, 1950, I served a copy of the above Statement of Points and Designation of Contents of Record upon Mr. Frank J. Hennessey, United States attorney, Post Office Building, San Francisco, California, attorney for appellee, by having said copy deposited in the United States mail.

/s/ HEINRICH ROEDEL,
Box 651-P.M.B. Alcatraz, Calif., Appellant in propria persona.

[Endorsed]: Filed March 22, 1950.